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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

C&G DEVELOPMENT CO., Plaintiff and Respondent, v. SAN FRANCISCO PETROLEUM CO., INC., Defendant and Appellant.	A094811 (Sonoma County Super. Ct. No. 225125)

San Francisco Petroleum Co., Inc., received a favorable judgment in an unlawful detainer action brought against it. However, dissatisfied with the amount of costs and attorney fees awarded in the judgment, the company brings this appeal. We conclude the trial court acted well within its discretion in limiting the award of costs and fees, and we affirm the judgment.

BACKGROUND

Appellant leased property from respondent for use as a gas station. One provision of the lease gave respondent the right to terminate in the event of actual or potential groundwater contamination at the property. In April 2000, alleging such contamination, respondent notified appellant the lease was terminated and ordered appellant to vacate the premises. When appellant failed to do so, respondent filed an action for unlawful detainer. In its answer, appellant contended any contamination derived from other sources and, furthermore, respondent's notice to quit the premises was untimely.

When the case proceeded to trial, the court requested testimony and argument first on the issue of whether respondent gave appellant sufficient notice and opportunity to

cure the contamination problem. Following the testimony of three witnesses, the court concluded respondent failed to give adequate notice of default under the lease. The court therefore awarded judgment in favor of the defense, although it observed that this ruling—based on insufficient notice alone—might merely delay the ultimate resolution of the parties' substantive dispute. At the close of the hearing, the court awarded appellant "scheduled" attorney fees of $375 and costs.

Appellant's memorandum of costs requested a total of $11,625.50 in costs, the bulk of which consisted of "expert witness fees." Appellant also filed a "motion for additional attorney fees," seeking fees of $13,211.68. The court denied the attorney fee motion as an improper motion for reconsideration. In addition, the court granted in part a motion by respondent to tax costs, resulting in a cost award to appellant of $2,200.50.

DISCUSSION

I. Cost Award

In an action such as this for equitable, rather than monetary relief, the trial court has discretion to allow costs or not. (Code Civ. Proc., § 1032, subd. (a)(4);[1] *United States Golf Assn. v. Arroyo Software Corp*. (1999) 69 Cal.App.4th 607, 625.) Appellate review of this exercise of discretion is limited, and a ruling on costs will be reversed "only where it is shown there is a 'clear abuse of discretion' and a 'miscarriage of justice.' [Citations.]" (*Heller v. Pillsbury Madison & Sutro* (1996) 50 Cal.App.4th 1367, 1395.)

Appellant claimed the following costs: $339 in filing and motion fees, $1,341.50 in deposition costs, $520 in fees for service of process and $9,425 in expert witness fees. At a hearing on the motion to tax costs, appellant orally amended the memorandum of costs to add an additional $1,000 in expert witness fees. Thus, of the $12,625.50 in costs appellant requested, $10,425 represented expert witness fees and $2,200.50 reflected other expenses. The trial court awarded only the latter amount, $2,200.50. This award was clearly appropriate.

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[1] All statutory references are to the Code of Civil Procedure unless otherwise stated.

Section 1033.5, subdivisions (a) and (b) enumerate specific items that are permissible and impermissible as costs. In addition, the statute directs that allowable costs shall be "reasonable in amount" and "reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation." (§ 1033.5, subd. (c)(2) & (3).) Each type of cost appellant claimed is addressed by a specific provision of section 1033.5. Filing and motion fees, deposition costs and fees for service of process are generally costs the court may allow. (§ 1033.5, subd. (a)(1), (3) & (4).) In fact, the trial court awarded appellant all of these costs, which totaled $2,200.50.

However, subdivision (b)(1) of section 1033.5 specifically provides that fees of a party's experts are *not* allowable unless they are expressly authorized by law. "Such express authorization exists in instances when the expert is court appointed (Code Civ. Proc., § 1033.5, subd. (a)(8)) or when the judgment awarded is lower than a rejected settlement offer (Code Civ. Proc, § 998, subds. (c) & (d))." (*First Nationwide Bank v. Mountain Cascade, Inc*. (2000) 77 Cal.App.4th 871, 876.) Neither situation applied here, and appellant offers no other basis for considering the expert witness fees "expressly authorized by law." Appellant simply asserts that expert witness fees may be recovered under the "catch-all" provision that any item required to be awarded to a prevailing party pursuant to statute is an allowable cost. (§ 1033.5, subd. (a)(13).) But appellant identifies no statute mandating a recovery of expert witness fees, and such fees are expressly *disallowed* by section 1033.5, subdivision (b)(1). Nor do the two cases appellant cites support his argument, since one is not citable (*Amelco Electric v. City of Thousand Oaks* (2000) 82 Cal.App.4th 373, review granted Oct. 25, 2000, S091069) and the discussion of expert witness fees in the other was not certified for publication. (*Gibson v. Bobroff* (1996) 49 Cal.App.4th 1202, 1207.) Accordingly, the trial court properly rejected appellant's request for expert witness fees.

II. Attorney Fee Award

Appellant next contends it was entitled to recover all requested attorney fees, rather than the limited sum awarded. Again, we conclude the award was within the trial court's considerable discretion.

The court has discretion to award attorney fees where such fees are authorized by, for example, a contract. (§ 1033.5, subd. (a)(10); *Beneficial Standard Properties, Inc. v. Scharps* (1977) 67 Cal.App.3d 227, 232.) Here, the court awarded $375 in attorney fees pursuant to a local court rule for unlawful detainer actions, which states, "[g]enerally, where attorney fees are due, the Court will fix them at $300.00 for default judgments and $375.00 for court trials absent satisfactory proof to the Court that the difficulty, risk, course of negotiations, necessary discovery, etc., justify a higher award." (Super. Ct. Sonoma County, Local Rules, rule 2.2E.) Appellant did not object when the court stated the amount to be awarded and did not file a motion for reconsideration. Instead, nearly one month after the court awarded fees of $375, appellant filed a "motion for additional attorney fees." Appellant claims it brought this motion "pursuant to" Sonoma County Local Rule 2.2, but neither Rule 2.2 nor any other Sonoma County Local Rule authorizes this belated motion. Moreover, given the trial court's observation that the parties would likely appear in court again to resolve their substantive dispute about alleged groundwater contamination, the court was justified in limiting appellant's attorney fees to the amount customarily awarded in unlawful detainer cases.

Finally, to the extent appellant now claims a right to attorney fees under Civil Code section 1717, appellant waived this argument by failing to raise it in the trial court. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 394, pp. 444-445.)

DISPOSITION

Judgment affirmed. Appellant to bear costs of the appeal.

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Parrilli, J.

We concur:

_____
McGuiness, P.J.

_____
Corrigan, J.